IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 104 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME-TAX

Versus

MILEX CABLE INDUSTRIES

Appearance:

1. INCOME TAX REFERENCE No. 104 of 1988
MR TANVISH U BHATT for Petitioner No. 1
MR KH KAJI for Respondent No. 1

CORAM : MR.JUSTICE A.R.DAVE
and
MR.JUSTICE K.M.MEHTA

Date of decision: 04/12/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE A.R.DAVE)

At the instance of the revenue, the following question of law has been referred to this court for its opinion by the Income Tax Appellate Tribunal, Ahmedabad Bench 'A', under the provisions of sec. 256(1) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') :

"Whether, on the facts and in the circumstances of the case, the penalty u/s 271(1)(c) of the Income-tax Act, 1961 was leviable on the assessee for the assessment years under reference?"

2. We have heard learned Standing Counsel Shri Tanvish Bhatt for the Central Government appearing for the applicant and learned advocate Shri K.H. Kaji appearing for the respondent-assessee.

3. The facts giving rise to the reference, in a nutshell, are as under :

4. The respondent assessee is a partnership firm. It filed its returns for the Assessment Years 1979-80 and 1980-81, the previous years being S.Ys. 2034 and 2035 respectively.

5. After filing the returns, the assessments were framed on 18.10.1979 and 12.2.1981 for the said two years, respectively. In the course of internal audit, it was revealed that the assessee had made certain mistakes in totals and as a result thereof, lesser income had been returned by the assessee. The said fact was revealed by the audit department somewhere in the month of April 1981 and the assessing officer was informed about the same in the same month. Upon getting the information with regard to the mistakes, which had resulted into showing lesser income by the assessee, the ITO had issued notice dated 4.7.1981 to the assessee. The assessing officer informed the assessee under the said letter that it was noticed that some mistakes had been committed in preparation of the accounts and as the assessing officer wanted to verify certain figures from the books of accounts, the assessee was requested to attend the office of the assessing officer on 13.7.1981.

6. In pursuance of the said notice, the assessee had attended the office of the assessing officer on 13.7.1981. On that day, the assessee had submitted a

letter dated 11th July 1981 wherein it was stated by the assessee that certain mistakes had been committed in the totalling and as a result thereof lesser income had been returned by the assessee for the A.Y. 1979-80 and A.Y. 1980-81. In the said reply dated 11.7.81, the assessee had not referred to the notice dated 4.7.81 issued to him by the assessing officer.

7. In view of the fact that mistakes had been committed in the totals and as a result of the investigation or audit work done by the audit party of the revenue, the income of the assessee was likely to be increased, the assessing officer sought guidance from the Commissioner of Income-tax, under his letter dated 5.8.1981, as to whether the CIT would like to exercise his powers under the provisions of sec. 263 of the Act. Thereupon, under letter dated 9.9.81, the CIT exercised his powers under sec. 263 of the Act and ultimately remanded the case to the assessing officer so that after taking into account the facts stated by the assessee as well as in pursuance of the further information gathered by the assessing officer, the assessment can be framed.

8. Ultimately, the assessing officer framed the assessment resulting into increase in income for both the assessment years.

9. The assessing officer also imposed penalty under the provisions of sec. 271(1)(c) of the Act upon the assessee as the assessee had concealed particulars of his income. The assessing officer ultimately imposed penalty of Rs. 78,920 for the A.Y. 1979-80 and penalty of Rs. 1,10,790 for the A.Y. 1980-81.

10. Being aggrieved by the orders passed by the assessing officer, the assessee filed appeals before the Commissioner of Income-tax (Appeals). It was the case of the assessee before the CIT(A) that there was no concealment of particulars of income by the assessee and as there was no mala fide intention of the assessee, the penalty ought not to have been imposed upon the assessee by the assessing officer. It was submitted before the CIT(A) that upon knowing the fact with regard to the mistakes committed by the assessee, the assessing officer was informed by the assessee under letter dated 11.7.81. It was also submitted that the assessee came to know about the mistakes which had been committed in totalling at the time when accounts for A.Y. 1982-83 were being prepared. Thus, it was submitted that the assessee himself had revealed the facts with regard to the mistakes committed in totalling and, therefore, no

penalty should have been imposed by the assessing officer.

11. After hearing the assessee, the CIT(A) upheld the orders passed by the assessing officer.

12. Being aggrieved by the orders passed by the CIT(A), the assessee filed appeals before the Tribunal.

13. After hearing the assessee, the members of the Tribunal had given different opinions. The Judicial Member had opined that there was no case for imposition of penalty, whereas the Accountant Member was of the view that the assessing officer was justified in imposing penalty. In the circumstances, according to the provisions of the Act, the case was referred to the third member, that is, the Vice-chairman of the Tribunal and the Vice-chairman had concurred with the view expressed by the Judicial Member of the Tribunal. Thus, the majority view of the Tribunal was to the effect that the penalty ought not to have been imposed upon the assessee.

14. In the above set of circumstances, the question which has been referred to this court is whether the penalty imposed upon the assessee under the provisions of sec. 271(1)(c) of the Act is justified.

15. Learned Standing Counsel Shri Tanvish Bhatt appearing for the revenue has vehemently submitted that the assessee had deliberately committed errors in totalling. According to him, it was not a case of an error, but it was an attempt to misguide the revenue. According to him, the totals were erroneous to such an extent that no accountant or even a man of normal prudence would ever commit such mistakes. He has drawn our attention to the fact that even the trial balance could not have tallied on account of the mistakes committed in the total. It has been submitted by him that only because the notice dated 4.7.81 had been issued to the assessee, the assessee got an idea that the fraud, which he had committed while making totals, had been revealed and, therefore, so as to see that the fraud is not revealed and the entire case is converted into a bona fide mistake, the assessee addressed the letter dated 11.7.81 to the assessing officer stating the fact that the errors had been committed in totalling and he made a request for rectification of the errors committed.

16. According to learned Standing Counsel Shri Bhatt, if notice dated 4.7.81 would not have been given to the

assessee, possibly the assessee would not have written the letter dated 11.7.81. It has been also submitted by him that though the assessee had written letter dated 11.7.81 only upon getting the notice dated 4.7.81, the assessee did not refer to the notice dated 4.7.81 addressed to him by the assessing officer. He has submitted that, in fact, the assessee was aware of the fact that he had made incorrect totals so as to understate the amount of income returned for the relevant assessment years. It has been, therefore, submitted by him that the view expressed by the dissenting Accountant Member of the Tribunal is just and proper. According to him, the Tribunal ought to have imposed penalty as the assessee had deliberately stated incorrect figures while totalling the trial balance. He has drawn our attention to the provisions of sec. 271(1)(c) of the Act to show that this is a just case where penalty should be imposed. It has been submitted by him that in fact by making incorrect totals, the assessee had made an effort to give inaccurate details or particulars about the income as the income had been reduced on account of deliberate act of the assessee.

17. Learned Standing Counsel Shri Bhatt has also drawn our attention to the contents of the judgment delivered in the case of CIT v. Vidyagauri Natverlal & Ors., 238 ITR 91. He has submitted that, according to the law laid down in the said judgment, stating incorrect details with regard to the total, would amount to concealment of income.

18. On the other hand, learned advocate Shri K.H. Kaji appearing for the assessee has submitted that the view expressed by the majority members of the Tribunal is just and proper. It has been submitted by him that immediately upon knowing the fact that mistakes had been committed in totalling, under letter dated 11.7.81, the assessee had informed the assessing officer that there were mistakes in the totals. According to him, it is pertinent to note that the mistakes had been revealed only when the accounts for the subsequent year were being drawn up. At that time it was found that errors had been committed in the totalling and immediately upon knowing the fact with regard to the mistakes committed by the assessee, the assessee had addressed letter dated 11.7.81. According to the learned advocate, the assessee had no dishonest intention to conceal particulars of his income.

19. It has been further submitted by learned advocate Shri Kaji that for the purpose of imposing penalty upon

the assessee, it must be established beyond any doubt that the assessee had dishonest intention. He has made an effort to compare the act of imposition of penalty with inflicting punishment under any penal law. He has submitted that the burden with regard to establishing the fact that the assessee had concealed the particulars of his income or had furnished inaccurate particulars of such income lies on the revenue. If the revenue is not in a position to establish the said fact beyond doubt, no penalty can be imposed upon any assessee. It has been also submitted by him that if there is any doubt with regard to the state of mind of the assessee, benefit of doubt must be given to the assessee.

20. He has also submitted that whether the assessee had a guilty mind is a question of fact. According to him, the Judicial Member and the Vice-Chairman have already come to the conclusion that it was not proper on the part of the revenue to impose penalty upon the assessee as the assessee was not having guilty mind. Whether the assessee wanted to conceal particulars of his income or wanted to furnish inaccurate particulars of such income is dependent on the state of mind of the assessee and when the Tribunal has opined that the assessee is not guilty of concealment of particulars of his income, this court should not reverse the finding of the Tribunal because the finding pertains to the fact and this court should not disturb the finding of the Tribunal unless it is found to be perverse, and according to the learned advocate, the finding arrived at by the Tribunal cannot be considered as perverse. He has further submitted that even the revenue has not submitted that the finding arrived at by the Tribunal is perverse. In the circumstances, according to him, the view expressed by the Tribunal should not be changed by this court.

21. We have heard the learned advocates at length and have also gone through the judgments cited by the learned advocates.

22. Upon perusal of the relevant orders and hearing the learned advocates, it is not in dispute that before the proceedings with regard to initiation of penalty and rectification started, the assessee had informed the assessing officer under his letter dated 11.7.81 that he had committed mistakes in totalling and this fact denotes that the assessee was not having guilty mind. It is true that the assessee had already received the notice dated 4.7.81 at the relevant time, but when the Tribunal has come to a conclusion that the assessee had no intention of concealing particulars of his income or misguiding the

assessing officer by making incorrect totals, in our opinion, it would not be proper for us to come to a different conclusion. It is a settled legal position that the finding of fact, which might be arrived at by the Tribunal, should not be interfered with by this court while giving its opinion under the provisions of sec. 256 of the Act. It is not in dispute that whether a person is having guilty mind or what state of mind the person is having and determination thereof is a question of fact and as the Tribunal has already opined that the assessee had not made any effort to conceal particulars of his income, it would be difficult for this court to set aside the said finding so as to accept the view expressed by the revenue before this court.

23. The Hon'ble Supreme Court in the case of Hindustan Steel Ltd. v. State of Orissa, 83 ITR 26 has already opined that penalty need not be imposed merely because it is lawful to do so. Even if minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty when there is a technical or venial breach of the provisions of the Act. In the instant case, mistakes were committed in totalling and the moment the assessee came to know about the mistakes committed in the books of accounts, while preparing the accounts for the subsequent year, under his letter dated 11.7.81, the assessee informed the assessing officer about the mistakes committed. Thus, in our opinion, the finding arrived at by the Tribunal to the effect that the assessee was not having any guilty mind or had no intention to conceal the particulars of his income, cannot be disturbed by this court.

24. Looking to the facts stated hereinabove and more particularly in view of the fact that the Tribunal has come to a final conclusion that there was no case for imposing penalty and the mental state of the assessee being a question of fact, in our opinion, it would not be proper to take a different view than the one which has been taken by the Tribunal.

25. Looking to the above-referred discussion and the law laid down in the judgments referred to hereinabove, we answer the question referred to us in the negative, i.e., in favour of the assessee and against the revenue.

The reference, thus, stands disposed of with no order as to costs.

(A.R. Dave, J.)

(K.M. Mehta, J.)

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